Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1971

No. 71-974

MARY DANIEL CONRAD, EXECUTRIX OF THE ESTATE OF GROVER C. CONRAD, DECEASED, and MARY DANIEL CONRAD, INDIVIDUALLY,

Petitioner,

v.

RUBY WANDA JUDSON, BETTY E. TREADAWAY, KATHRYN L. McCARTHY, NATHLYN L. MURDOCH and FRANCES I. STEVENSON ROSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas

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To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas

Petitioner, Mary Daniel Conrad, Executrix of the Estate of Grover C. Conrad, deceased and Mary Daniel Conrad, individually, prays that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the 5th Supreme Judicial District of Texas entered in the above entitled case on March 5, 1971.

I. CITATION TO OPINION BELOW

The opinion of the Court of Civil Appeals, printed in Appendix "A" hereto, is printed in 465 S.W. 2d 819 (1971). (A copy of the printed opinion is attached hereto and references will be made to the printed page numbers). The Supreme Court of Texas wrote no opinion in refusing Petitioner's Application for a Writ of Error.

II. JURISDICTION

The judgment of the Court of Civil Appeals was entered March 5, 1971. The order denying Petitioner's Motion for Rehearing by the Court of Civil Appeals was entered April 9, 1971. Appendix "B" hereto, Petitioner's Application for Writ of Error to the Supreme Court of Texas, timely filed, was refused, no reversible error, July 21, 1971, Appendix "C" hereto. Order denying Petitioner's Motion for Rehearing on his Application for Writ of Error to the Texas Supreme Court was overruled November 10, 1971, Appendix "D" hereto. The order denying Petitioner's Motion for Leave to File Second Motion for Rehearing was overruled December 1, 1971, Appendix "E", hereto. The Court of Civil Appeals thus became in this case the highest court in the State in which a decision could be had, *Panhandle Eastern Pipeline Company v. Calvert*, 347 U.S. 157 (1954).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) because Rules 277 and 279, Texas Rules of Civil Procedure, are invalid as applied by the Texas Court in this case because such application has resulted in the denial and abridgment of Petitioner's duly vested property

rights without due process of law in controvention of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States of America, Article V, Sec. 10, Constitution of the State of Texas, and to the further denial to Petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

III. QUESTION PRESENTED

Petitioner, Mary Conrad, a citizen of Texas and the United States is the record legal title owner to various parcels of real estate known as "Lake Ranch" in the State of Texas. Such real estate was acquired by Petitioner and her husband, Grover C. Conrad, during their marriage. Respondents, five step-daughters of Petitioner, brought suit for a partnership accounting, a money judgment and for title to real estate, against their father and Petitioner, individually. Grover C. Conrad died during the litigation and his estate was made a party. The five deeds conveying the said real estate to Petitioner individually were introduced into evidence without limitation or qualification. No claim was made nor evidence introduced that Petitioner ever breached any duty, acted improperly or unlawfully toward Respondents. The trial was before a jury and in the only special issues submitted to the jury the following facts were found:

(1) That a partnership existed between Grover Conrad and his daughters beginning on or about July 1, 1950;

(2) That the partnership continued to exist until Grover Conrad's death in 1966; and

(3) That Grover Conrad was the manager of the partnership throughout its existence.

No issue was requested or submitted to the jury that said real estate was a partnership asset. No issue was requested or submitted to the jury challenging the record legal title of Petitioner to said real estate. Nevertheless, allegedly based on the jury findings, the Trial Court entered a comprehensive ten page judgment holding Petitioner and Grover Conrad's estate liable for large sums of money and ordering conveyance of all Petitioner's real estate to the alleged partnership. This Petition is directed only to that part of the judgment holding that the real estate was an asset of the partnership and divesting Petitioner of all of her title to said such land. Although the Court of Civil Appeals modified the Trial Court's judgment by holding that Petitioner was not liable to Respondents in any respect in her individual capacity, the Court of Civil Appeals refused to reverse the Trial Court's judgment divesting Petitioner of all of her title to the real estate and the Supreme Court of Texas declined to further consider the case. The question presented is:

Whether the Texas Courts through the use of the "special issue" charge to the jury have the right or power to deny to Petitioner her right to have the jury actually pass on the validity of her title to real estate standing in her name on duly recorded deeds of conveyances to her where Pe-

titioner invoked her right of trial by jury but Respondents did not prove and did not seek to obtain findings by the jury of any facts which would authorize the District Court to enter a judgment divesting Petitioner of her record legal title to the real estate.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitutional provisions involved in this case are the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States and Article V, Sec. 10 of the Constitution of the State of Texas which Article grants parties the right of trial by jury. This Article is printed in Appendix "F" hereto.

2. The Statutory provisions involved are Rules 277 and 279, Texas Rules of Civil Procedure. These are printed in Appendix "F" hereto.

V. STATEMENT

1. *Material Facts*

("Tr." herein refers to the Transcript. "S.F." refers to the Statement of Facts. These are separate documents under Texas Appellant practice).

Respondents are married sisters who sued their father, Grover C. Conrad, and his wife, Petitioner, Mary Conrad, individually and later as Administratirix of the Estate of Grover C. Conrad who died during the litigation. The suit was to establish a partnership between Conrad and the daughters for the management and disposition of community assets of Conrad and his first wife, Edith Conrad, the mother

of the Respondents who died intestate January 14, 1949; for an accounting, for a money judgment and for title to real estate (Tr. 134-148).

Under the Texas law of descent and distribution one-half of the community property of Edith and Grover Conrad belonged to Grover Conrad while Edith Conrad's interest in the community property went to the five daughters. The property involved was primarily producing oil wells which Grover Conrad had managed and operated for many years on a salary. He continued to manage and operate after Edith Conrad's death on the basis that he owned 50% of these oil properties and his daughters owned the other 50%. (This operation was called "Conrad et al" or the "et al" operation or account).

Respondents allege that approximately 281 acres of land in Collin County, Texas, hereinafter referred to as the "Lake Ranch" property was purchased with alleged partnership funds. Title to this property was taken in the name of Grover C. Conrad and Mary Daniel Conrad during their marriage and all of this property was conveyed on the first day of February, 1963 to Mary Conrad. Respondents claim this land should be declared an asset of the alleged partnership. (Tr. 139, 140)

Respondents urged in numerous instances that their father, Grover Conrad, had breached alleged fiduciary duties which he owed to them, but Respondents made no claim and produced no evidence that Petitioner, Mary Conrad, either had any fiduciary duty owing to them or that Mary Conrad had breached any such duty or that she in any way acted improperly or unlawfully toward Respondents.

All of the deeds were introduced into evidence by Respondents without limitation or qualification by the Respondents. (Plaintiff's Exhibits Nos. 22, 23, 24, 25, 26, 29, 30 and 31)

Respondents' witness Mr. Joe D. Melton, a Certified Public Accountant, testified with respect to the money expenditures drawn out of the "Conrad et al" account for the "Lake Ranch" properties. At first these expenditures were recorded in a "receivable account." Later the expenditures for "Lake Ranch" were charged to Mr. Conrad's drawing account. He testified that by "account receivable" he meant that this was an indebtedness owed to the et al operation by "Lake Ranch". (S.F. 29)

When Mr. Melton was asked the following question:

> "So that it was not any attempt to spend the money of et al on these ranches, but it was simply an account receivable, some money that had been advanced was due back to the et al, is that right". (S.F. 29)

Later the question was rephrased:

> "Now Mr. Melton, is a receivable taking money away to the personal benefit of an owner or it is simply a debt which is due back to the owner. To which Melton replied, "It is only a debt that is due back to the owners." (S.F. 30, 31)

Melton testified that the debt on the Lake Ranch property was subsequently repaid to the "Conrad et al" account by charging it to Grover Conrad's personal drawing account. After the period of time when expenditures for Lake Ranch were handled as receivables, *any money that was spent on Lake Ranch was charged directly to Grover Conrad's per-*

sonal drawing account. He agreed that the charges for Lake Ranch were a portion of Grover Conrad's drawings just as checks that were written to the daughters were part of their drawings. There was no difference at all in the net results. *Every penny that was used on the Lake Ranch was ultimately charged to Conrad personally*. Not one penny of the expenditures on the Lake Ranch or any of the Collin County properties was ever charged to Conrad's five daughters. (S.F. 31, 32)

Counsel for plaintiffs on re-direct examination of his witness, Mr. Melton, attempted to elicit testimony that there was some differences in the net effect on the capital account where items were charged to the drawing account or charged to the receivable account, but failed to do so, getting only reaffirmation that the net effect is the same. (S.F. 33, 34)

Mr. Harry Tracy Nelson, the court appointed auditor and a Certified Public Accountant, called as plaintiff's witness, was cross-examined as follows:

> "Q. Mr. Nelson, in your audit report you have approximately from Pages 9 through 19, many of them being double or turnout pages, deal completely with payments made out of the et al account for the Lake Ranch or Twin Creed Ranch account, do you not? (The auditor's report is Plaintiff's Exhibit 2)
>
> "A. Yes, sir, I believe that's right.
>
> "Q. All of that money was charged ultimately to Grover Conrad's drawing account, wasn't it?
>
> "A. That's right.
>
> "Q. Not one dime of all this lengthy examination of the amounts that were paid for the Lake Ranch ac-

count was charged to any one of the five daughters, was it?" (S.F. 58).

"A. "No." (S.F. 58)

On page 4 of the audit is the following: (Exhibit P-2)

> "In the years 1959, 1960, 1961 and 1962 the 'G. C. Conrad Lake Ranch Account' was carried on the books of the G. C. Conrad, et al, and the debit balance of this account was built up to $48,264.73 at the end of the 4-year period, ending December 31, 1962. This account was then charged to the G. C. Conrad Drawing Account on December 31, 1962. * * *"

The above summarizes all the substantial evidence with respect to the funds for the "Lake Ranch" property. There was no contrary evidence of any kind.

Only those three special issues described on page 3 supra were submitted to the jury. (Tr. 160)

There was no issue submitted to the jury, and no jury finding that the "Lake Ranch" property was a partnership asset. There was no issue submitted to the jury challenging the record legal title of Mary Conrad to "Lake Ranch" property. There was no jury finding of any wrongful or fraudulent act either by Grover Conrad or by Petitioner. There was no jury finding questioning the consideration paid for the "Lake Ranch" property either by Grover Conrad or Petitioner. There was no jury finding questioning whether Petitioner had any knowledge of any claims or rights of the Respondents to "Lake Ranch" property.

The Trial Court judgment held Petitioner individually liable for a money judgment of $40,290.12 plus $41,076.27 in interest (Tr. 175). The Trial Court judgment also de-

creed that the "Lake Ranch" property and her homestead at 5530 Lobello Drive, Dallas, Texas, should be deeded by Petitioner "individually" to Respondent McCarthy for the use of the partnership. Petitioner must also give up possession of her homestead (Tr. 172).

The Court of Civil Appeals modified the Trial Court's judgment by eliminating the money judgment of $40,290.12 plus $41,076.27 in interest against Petitioner as an individual because there is no basis in the record for such personal liability. (465 S.W. at page 827, 828) However, the Court of Civil Appeals failed and refused to modify or change the Trial Court's judgment decreeing that Petitioner must deed the "Lake Ranch" property and her homestead at 5530 Lobello Drive to Respondent McCarthy and give up possession of her homestead.

2. *How the Federal Question Was Presented in the State Courts.*

After the Trial Court entered its sweeping inequitable judgment allegedly based on the jury's answers to three special issues, Petitioner filed a Request to the Trial Court for findings of fact and conclusions of law (Tr. 280) and followed this up with a Notification of Omission to File Findings of Fact and Conclusions of Law (Tr. 290). The Trial Court refused and failed to file any findings of fact or conclusions of law although in its judgment it was stated that the judgment was entered "* * * having made such additional considerations and findings as are authorized by law, * * *" (Tr. 171). Rule 296, Texas Rules of Civil Procedure requires a Trial Court to file findings of

fact and conclusions of law in a trial without a jury. Petitioner also filed a Motion for Judgment which included a request that the Trial Court enter a judgment that title to the "Lake Ranch" be quieted in Mary Conrad individually and that the homestead on Lobello Drive belong one-half to G. C. Conrad and one-tenth each to Respondents as tenant in common with Petitioner as a surviving widow of Conrad with the right to continue occupancy of the homestead for the remainder of her life (Tr. 164-168).

On appeal to the Texas Court of Civil Appeals following points were presented and argued to said Court:

> "FOURTEENTH POINT. The Trial Court erred in failing to file findings of fact and conclusions of law as requested by Defendant because judgment entered in this cause went far beyond the three issues found by the jury and such judgment was in essence the result of a trial by the Court and was based on unstated finding of fact and conclusions of law by the Trial Court."
>
> "TWENTY FIRST POINT. The Trial Court erred in awarding to Kathryn McCarthy the "Lake Ranch" property and in ordering Mrs. Conrad within thirty days to convey by special warranty deed all her title and interest in the "Lake Ranch" property to Kathryn McCarthy because there was no evidence as to how much her separate funds or community funds went into the 'Lake Ranch' property.
>
> "TWENTY FOURTH POINT. The Trial Court erred in decreeing title to the 'Lake Ranch' property into Kathryn L. McCarthy upon failure of Mrs. Conrad to execute a deed to Kathryn McCarthy because there is no evidence to show any interest of the alleged partnership in the 'Lake Ranch' property."

After the Trial Court's judgment as modified was affirmed by the Court of Civil Appeals and Petitioner's Motion for Rehearing was overruled by said Court, Petitioner then applied for a Writ of Error to the Supreme Court repeating and re-urging the Points of Error next quoted above and in addition Petitioner at that time representing herself Pro Se urged

> "The Court of Civil Appeals erred in holding with the Trial Court that Mrs. Conrad should deed her chicken ranch ('Lake Ranch' property) to alleged partnership and likewise her home, and get out in thirty days and pay $40,000.00 cash to Mrs. McCarthy and do all of the things ordered in the judgment created by the Trial Court.
>
> "Because this judgment was improperly created in a manner contrary to Texas Rules of Civil Procedure; and in violation of the early law by the Legislature of 1853 which said that functions of judge and jury should be kept separate and also it would be prohibited under the ruling by the Supreme Court case cited below:"

In Petitioner's Motion for Rehearing on Application for Writ of Error to the Supreme Court of Texas the focus was primarily on the absence of jury findings to support the Court's judgment and that Petitioner holds legal title to "Lake Ranch" and Respondents failed to submit special issues to the jury challenging her title thereto.

In Petitioner's Second Motion for Rehearing on Application for Writ of Error to the Supreme Court of Texas the focus of the argument was the decision of the Court below divesting Petitioner of property rights duly vested in her individual capacity constitute a denial of Petitioner's prop-

erty right without due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States of America and a denial to the equal protection of the laws as guaranteed by the Fourteenth Amendment to such Constitution.

VI. REASONS FOR GRANTING THE WRIT

1. The Writ Should Be Granted Because The Decisions Below Denied To Petitioner A Jury Trial On Her Property Rights Duly Vested In Her In Her Individual Capacity and this was a denial of Petitioner's property rights without due process of law in contravention of the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States, and Article V, Sec. 10, Constitution of the State of Texas and a denial to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The method of the special issue charge employed by the Trial Court was an unconstitutional method because the Trial Court failed to submit the controlling issues to the jury, which failure resulted in Petitioner being denied a jury trial on her property rights. Petitioner was given the form and illusion of a jury trial but was denied the substantive Constitutional rights to have a jury of her peers pass on the question of the divesture of her property.

Respondents are the plaintiffs in the lawsuit. Respondents have the burden of pleading, introducing evidence and obtaining findings of fact by the jury on all issues necessary for entry of an order by the Court divesting legal record title to "Lake Ranch" from Petitioner.

There was no issue submitted to the jury with respect to "Lake Ranch" or Lobello, consequently there is no jury finding that either of these properties are a partnership asset. On the undisputed record there is no evidence that Petitioner's title to "Lake Ranch" was derived from or through the partnership or the estate of her deceased husband. Her title comes directly to her on duly recorded deeds of conveyance.

The Texas Supreme Court has held:

> "* * * It is the duty of the Trial Court to submit all controverted ultimate fact issues made by the pleadings and the evidence. The submission must be made in such manner as to fairly submit the issues made by both the plaintiffs and defendant * * *." *Texas General Indemnity Co. v. Scott*. 253 S.W. 2d 651 (Sup. Ct. 1953).

None of the controverted fact issues except those of partnership were even submitted conditionally to the findings on the issues of partnership. The ultimate or controlling fact issues which should have been submitted to the jury include:

1. whether the "Lake Ranch" property was a partnership asset even though Mrs. Conrad was the record title owner of the property,

2. whether the salary credits taken by Mr. Conrad for 15 years work were unreasonable,

3. whether the $54,751.05 *suggested* by the auditors to be charged as a debit to Mr. Conrad was a proper charge,

4. whether the "Lake Ranch" property acquired during the marriage of Mrs. Conrad and Grover Conrad was their community estate,

5. whether the salary drawings by Mr. Conrad were unauthorized,

6. whether Mr. Conrad as manager of the Conrad et al operation was entitled to the usual and customary salary for his management services,

7. whether the Statute of Limitations barred respondent's claims. All of these controlling issues were respondent's burden to prove and to request issues.

These controlling issues are listed to give this Honorable Court some comprehension of the extent to which the trial judge invaded the province of the jury.

All of these controlling issues were decided by the trial judge rather than by the jury. The trial on the *controlling* issues was by the court and *not by the jury*. This method employed by the trial judge could be regarded as a non-jury trial under Rule 296. The refusal of the Trial Court to make findings of fact and conclusions of law in a non-jury trial is reversible error. The harm is presumed and it is disclosed on the face of the judgment. *Board Fireman's Relief Fund v. Stevens*, 372 S.W. 2d 572 (Tex. Civ. App. 1963).

The Petitioner, at a time when she was representing herself *pro se* felt that the judgment went far beyond the three issues answered by the jury. She filed a request for findings of fact and conclusions of law (Tr. 280). She followed this up with a notification of omission to file findings of fact and conclusions of law (Tr. 290). The trial court did not file any findings of fact or conclusions of law.

The Court of Civil Appeals held the trial court was not required to file findings of fact and conclusions of law *because it was a jury trial* (465 S.W. 2d at p. 827). But the Court of Civil Appeals was in fundamental constitutional error in affirming the judgment based on controlling on ultimate issues which were never submitted to the jury.

This was unconstitutional because this was a jury trial in form only. Mrs. Conrad did not get a constitutional trial before the jury because the jury was not permitted to pass on the essential or controlling issues.

Regardless of the proficiency of trial defense or the lack of it, the traditional responsibility and burden of Respondents to prove the truth of their allegations by due process of law remains unchanged. The daughters brought suit against their father chiefly on the allegations that their father had taken money which belonged to them by taking salary drawings which were unauthorized.

It was the burden of proof of the Respondents daughters to prove the truth of their allegations and get the jury finding that the "Lake Ranch" property was a partnership asset instead of the Conrads' community property or Mrs. Conrad's separate property. It was their burden of proof and burden to get jury findings that their father had taken money unto himself unlawfully which money rightfully belonged to his daughters. To find by jury decree that Conrad et al was a partnership was not a finding on the controlling issues. Such finding did not of itself in any way prove the truth of their allegations. A manager of a partnership may also be entitled to compensation for his work.

To prove that he had taken money to which he was not entitled was a fact issue which respondent had the responsibility of presenting to the jury.

Because the controlling issues were not submitted Petitioner is faced with a judgment taking away her homestead, all her real estate and a money judgment against her late husband's estate. Her late husband was done a great injustice by his five daughters ranging between 40 and 50 years old who all have able husbands to provide for them. They attack their faithful father who had served them industriously for 48 years when he finally admitted he needed the money and he presumed to take his accumulated salary to the extent of $37,250 from the huge profits he had created for his five daughters. This charge amounted to approximately $6,450 from each daughter for a period of 15½ years of service and work by Mr. Conrad. The daughters had drawn from the account a total of $293,000.00 and Mr. Conrad had netted $212,581 in profits for them.

The Texas Supreme Court in *Glens Falls Ins. Co. v. Peters*, 386 S.W. 2d 529 (1965) held that a plaintiff who allows the trial court without objection to submit the case to the jury on one theory of recovery waived the right to any judgment on a different pleaded theory. Under the provisions of Rule 279, Texas Rules of Civil Procedure, an independent ground of recovery not conclusively established by the evidence is waived if no issue on such independent grounds is given or requested. The court cited a number of cases including *Wichita Falls & Oklahoma Railway v. Pepper*, 135 S.W. 2d 79 (Tex. 1940).

The Supreme Court in *Peters* re-emphasized the law embodied in Rule 279 that the trial court is not authorized to make findings of fact where the omitted issue or issues is an independent ground of recovery citing *Austin v. Austin*, 182 S.W. 2d 355 (1944), and *Wichita Falls & Oklahoma Railway Co. v. Pepper*, 135 S.W. 2d 79 Tex. (1940).

Peters is a reaffirmation of the principles stated in the landmark cases, *Ormsby v. Ratcliffe*, 117 Tex. 2d 242, 1 S.W. 1084 (1928), and *Wichita Falls & Oklahoma Railway Co. v. Pepper*, supra. In *Pepper* the Court stated that the terms "ultimate issues," "ultimate facts," "essential facts," essential issues" and "controlling issues" are frequently used synonymously; that an ultimate fact is one essential to the right of action or matter of defense and it is the *duty* of the court to submit such issue for determination by the jury. The Court said a fundamental principle is: in a case tried before a jury each litigant has the legal right to have the jury pass upon the ultimate or essential issues of fact raised by the pleadings in the evidence. The Court stated:

> "* * * the power of the judge to make findings where none are submitted or requested *does not extend to ultimate or essential issues which are necessary to base a judgment thereon, or to independent grounds of recovery or defense. * * * no duty rests on the defendant to present such issues as are essential to recovery by the plaintiff.* In such case, if the *party has failed to request for submissions such issue, or issues,* as will sustain his action or defense, he has not met the burden placed upon him by law, and no waiver can be imputed to the other for such failure * * *." (pp. 84-85). (Emphasis supplied.)

Despite the above unequivocal language that applies directly and factually to the situation in the trial of this case, Petitioner has failed to get the Texas Courts to give her an opportunity to have her property rights adjudicated by a trial jury.

In other jurisdictions and in the federal courts, jurors know the effect of their findings or decisions and lawyers are allowed to argue the effect of their answers. But Petitioner was denied equal protection of the laws by the method applied in the use of the jury and the Special Issue System. The jury nor Petitioner's trial attorney could not know the devastating result of the jury's answers to three seeming special issues on partnership. If trial counsel did know he was prohibited from so informing the jury.

The facts testified to by Respondent's witness Nelson and Melton, together with Mr. Nelson's audit shows that the judgment is contrary to the facts and also amounts to a double recovery. The Court of Civil Appeals admits the possibility of a double recovery (Page 829, last full paragraph) but tells Petitioner to bow to the Trial Court's order to surrender all the books of "Conrad et al" to Respondents and try to show that any of Conrad's money went into "Lake Ranch" in the process of winding up the affairs (830). Both Nelson and Melton agree the books show a charge of $54,751.05 to the *individual capital account* of Mr. Conrad as *his* investment in the "Lake Ranch" property. Earlier portions of this investment were set up as accounts receivable, i.e. a debt owing to "et al" by Conrad. These accounts receivable were paid by Mr. Conrad's indi-

vidual capital account. Both Nelson and Melton agreed that *not one dime or one penny of the amounts paid for the "Lake Ranch" property was charged to Respondents* or to "Conrad et al", *all money* was ultimately charged to Mr. Conrad *personally*.

The uncontradicted evidence is that Mr. Conrad paid for the "Lake Ranch" property by drawings from his individual capital account. This account was made up of his proportionate share of profits plus the salary credits of 1963 and 1964 ($60,000 for salary not drawn from 1951 through 1963 and $14,500 salary for 1964).

The judgment decrees the Ranch property to be a "partnership" or "et al" asset *and* decrees a *money judgment* for alleged unauthorized drawings by Grover Conrad consisting mainly of the $74,500 salary credit. If the estate of Mr. Conrad is liable to Respondents for anything at all it should only be for the *value* of the alleged unauthorized drawings. That *value* might be measured *either* by the net money total ($54,751.05 net after credit of Grover Conrad's capital drawing account balance) *or* by the "Lake Ranch" property into which the money was invested. The judgment in decreeing recovery of *both* the *money* and the "*Lake Ranch*" *property* has decreed a judgment of double the value it should have. But the unconstitutional effect of this judgment is starkly revealed by the fact that the jury was not permitted to decide the title to "Lake Ranch" on the evidence of Nelson and Melton that all the money that went into the "Lake Ranch" was charged to Mr. Conrad *personally*. Even if Petitioner proves this again in the process the Trial Court

ordered in winding up the affairs of the partnership, she is still faced with the judgment divesting her of her title to "Lake Ranch." This judgment will become final unless this Honorable Court rectifies the unconstitutional denial of due process of law that has occurred.

2. This Honorable Court has refused to let the Texas Special Issue System deprive citizens of their rights under federal law in cases tried in the state courts and should not let the Special Issue System deprive citizens of their rights under the constitution.

In *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 1 L. Ed. 2d 889, 77 S. Ct. 840 (1957) the United States Supreme Court reversed the lower Texas courts in a FELA case where the jury's general verdict that the railroad negligently contributed to the petitioner's injury, had support in the testimony of witnesses, but that the special issues answered by the jury were claimed to be in conflict with this finding and the Court of Civil Appeals held that the special issues controlled. The Supreme Court held that the petitioner having asserted federal rights governed by federal law it was their duty under the act to make certain that they were fully protected and "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Citing *Davis v. Wechsler*, 263 U.S. 22, 24, 68 L. Ed. 143, 145, 44 S. Ct. 13.

In *Baker v. Texas and Pacific Railway Company*, 359 U.S. 227, 3 L. Ed. 2d 756, 79 S. Ct. 664 (1959) it was the petitioners' position that they were deprived of their constitutional right to jury trial to determine their rights under FELA.

In *Baker* the trial judge failed to submit a special issue to the jury for its determination whether the plaintiff was employed by defendant. Instead the trial judge held as a matter of law the plaintiff was not so employed. This Honorable Court held the issue was properly one for determination by the jury and reversed the Texas Courts. In the instant case the trial judge has failed to submit more fundamental issues than the *Baker* case issue and has wrongfully decided these issues himself.

This Court has said many times that the states cannot, in the exercise of control over local laws and practice, vest the state courts with power to violate the supreme law of the land, *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed 370 (1940) *Public Service Company of Utah v. Wycoff Co.*, 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291.

In *Davis v. State of N. C.*, 196 F. Supp., 488, (D. C. N. C. 1961) reversed on other grounds, 310 F. 2d 904, it is stated that instructions to the jury are normally matters of state law and procedure not involving constitutional issues, and it is only in circumstances impugning fudamental fairness or infringing specific constitutional protection that a federal question is presented. Petitioner urges that circumstances impugning fundamental fairness and infringing specific constitutional protection exist in this case.

Among cases arising in state courts that have been accepted by this Honorable Court under the Fourteenth Amendment are *Hansberry v. Lee*, Illinois 1940, 61 S. Ct. 115, 311 U.S. 32, 85 L. Ed. 22, 132 A.L.R. 741, where the

Court examined procedure of two state cases to find whether the litigant was "due process of law" and *Senior v. Braden*, Ohio 1935, 295 U.S. 422, which held that the State of Ohio could not label an equitable interest in real estate by a different name in order to tax the interest as personal property.

In its Judgment the Trial Court awarded title to the "Lake Ranch" property to Mrs. Kathryn L. McCarthy, as surviving partner of the "G. C. Conrad, Et Al" partnership (Tr. 19). Specifically, the Trial Court directed Mrs. Mary Conrad to convey this property to Mrs. McCarthy by special warranty deed within thirty days after Judgment is final in the case (Tr. 172).

The Court of Civil Appeals affirmed this ruling on the grounds that if Mrs. Conrad had a separate or community property interest in "Lake Ranch", she had the burden of adducing evidence proving such interest, and securing jury findings thereon. The Court held that Mrs. Conrad failed to shoulder this burden, and therefore had no claim to "Lake Ranch" (465 S.W. 2d at 831).

The opinion of the Court of Civil Appeals is constitutionally in error on this issue. It is true that Mrs. Conrad offered no testimony on the extent of her ownership in "Lake Ranch". Her trial attorney only states his position in the record that the "Lake Ranch" property was a "private affair" of Mrs. Conrad and her deceased husband, and was not, therefore, a matter of concern to the partnership (S.E. 212). This is not, however, the entire state of the record on

the issue. *Plaintiffs themselves introduced the three deeds by which Mr. Grover Conrad conveyed all of his interest in "Lake Ranch" to his wife, Mary Conrad on February 1, 1963.* (Plaintiff's Exhibits 29, 30 and 31) (Identified at S.E. 191, Introduced at S.F. 204).

Each of these three deeds recites that Mary Daniel Conrad paid ten dollars and other "valuable considerations" for the conveyance to her by her husband. Further, each deed is duly acknowledged, and reflects proper recordation in the deed records of Collins County, Texas. Respondents' counsel himself recites into the record that, by stipulation of the parties, the copies of the deed were not certified, and thus there can be no technical objection to the authenticity of these exhibits. (S.E. 204). In fact, in that Respondents themselves introduced the three deeds, they are bound by the contents thereof, and cannot now be heard to repudiate their effect. *Stevens Bros. v. Mills*, 326 S.W. 2d 921 (Tex. Civ. App. 1960. writ ref'd. n.r.e.); *Panhandle & S.F.R. Co. v. Clarendon Grain Co.*, 215 S.W. 866 (Tex. Civ. App. 1919).

Thus the record conclusively shows that at the time of trial legal title to the property was in Mrs. Conrad, and the effect of these conveyances from her husband was to make "Lake Ranch" her separate property. *Lewis v. Simon*, 72 Tex. 470, 10 S.W. 544 (1889); *McAdams v. Ogletree*, 348 S.W. 3rd 75 (Tex. Civ. App. 1961, writ ref'd. n.r.e.). See 30 Tex. Jur. 2d, Husband and Wife. § 89.

While Mrs. Conrad may not have introduced evidence as to the extent of her ownership in "Lake Ranch", she is certainly entitled to claim the benefit of Respondents' Ex-

hibits 29, 30 and 31. These deeds conclusively show that at the time of trial of this case she held legal title to "Lake Ranch" as her separate property. The Court of Civil Appeals is therefore incorrect in concluding that there is "no evidence" as to Mrs. Conrad's claim of ownership to "Lake Ranch". To the contrary, the deeds establish a prima facie showing of ownership by Mrs. Conrad. Because legal title was in her name, possession is established by construction of law and ownership is presumed. *Murphy v. Welder*, 58 Tex. 235 (Tex. Sup. Ct. 1883). 46 Tex. Jr. 2d. Property § 6.

The burden was therefore on the Respondents to challenge Mrs. Conrad's title, and go forward with evidence demonstrating some defect in her ownership, or some aspect of the conveyances from her husband which rendered them voidable.

> The burden of rebutting a prima facie showing of title rests upon the party attacking the title shown. 42 Am. Jr., Property § 22.
>
> The burden of proof is on him who alleges that the ownership does not accord the legal title * * * 68 C.J.S., Partnership, § 74.

Under long established Texas authority, a deed is presumed to be fair and not fraudulent. The person who attacks the validity of a deed has the burden of proving the existence of fraud, lack of consideration or other fatal defect which voids the deed. *Giddings v. Steele*, 28 Tex. 758 (Tex. Sup. Ct. 1866); *Compton, Ault & Co. v. Marshall*, 88 Tex. 50, 29 S.W. 1059 (1895). Fraud cannot be presumed in the absence of evidence.

The instant case is analogous to those cases in which a creditor has challenged a conveyance from husband to wife after the creditor has established a debt against the husband. Even in these decisions, however, the courts have not presumed fraud. The burden remains on the creditor to go forward with evidence and secure jury findings on the fraud. *Stevens v. Cobern*, 213 S.W. 925, 109 Tex. 574 (1919); *Rilling v. Schultze*, 67 S.W. 403, 95 Tex. 356 (1902).

Respondents stand in no better position than an aggrieved creditor. If they claim that assets belonging to the partnership have been invested in "Lake Ranch," their recovery of the Ranch is blocked by a conveyance to Mrs. Conrad, who, from the status of the record, is an innocent purchaser for value. Respondents might have proven, if they had attempted to do so, that Mrs. Conrad paid no consideration, or that she knew of the receivable to the partnership on behalf of the ranch. *They failed, however, to pursue such evidence or secure jury findings on such issues. Thus, they wholly failed to shoulder the burden which is clearly set out in the Texas authorities previously cited.* Just as Mrs. Conrad may have failed to carry her burden to submit issues as to an implied contract by the partnership to pay salary to her husband, Respondents have failed to secure jury findings which would set aside Mrs. Conrad's title to "Lake Ranch."

Petitioner in no way concedes that partnership assets were in fact used to purchase or equip "Lake Ranch." To the contrary, the evidence unequivocally points to the conclusion that *no* partnership funds were invested in "Lake

Ranch". Petitioner only asserts that, even if the Court of Civil Appeals was correct, and "Lake Ranch" is a partnership asset by reason of investment of partnership funds, the title was no longer in Grover Conrad's name at the time this suit was filed in 1965. By valid and unchallenged conveyances, "Lake Ranch" was transferred to Mrs. Conrad. Mrs. Conrad was not a partner; she had no fiduciary responsibility to anyone. She enjoys the status of an innocent purchaser for value until Respondents prove otherwise, which they did not even attempt to do in the trial of this cause.

In the face of this record, the Trial Court cannot conclude as a matter of law that the conveyances were fraudulent. Its judgment divesting title from Mary Daniel Conrad was unconstitutional and should therefore be set aside.

CONCLUSION

The judgment and opinion of the Court of Civil Appeals deprives Petitioner of her constitutional right to trial by jury on her property rights in denial of her rights under the Fifth, Seventh and Fourteenth Amendments of the Constitution of the United States and Article V Sec. 10 of the Constitution of the State of Texas. For all the foregoing reasons this Petition for Writ of Certiorari should be granted.

HARVEY L. DAVIS,
3315 Daniel Street,
Dallas, Texas 75205,
Attorney for Petitioner.

Mary Daniel CONRAD, Ind. and as Executrix of the Estate of Grover C. Conrad, Appellant,

v.

Ruby Wanda JUDSON et al., Appellees.

No. 17588.

Court of Civil Appeals of Texas, Dallas.

March 5, 1971.

Rehearing Denied April 9, 1971.

BATEMAN, Justice.

The five appellees are sisters. They sued their father, Groved C. Conrad, to establish a partnership between him and them for the management and disposition of community assets of Conrad and his first wife, Edith Conrad, mother of appellees, who died intestate. Appellees sought a declaration of ownership by the partnership of certain real property, an accounting of all partnership operations, and a distribution to them of their mother's estate not previously distributed, and for general relief. Conrad died while the suit was pending and his second wife, Mary Conrad, was substituted as legal representative of his estate and also in her individual capacity. She filed an amended answer and counterclaim for the value of Conrad's services in operating the properties, and her attorney's fee under Vernon's Ann.Civ.St., Art. 2226.

The jury found, in response to the issues submitted to them: (1) the existence of a partnership between Conrad and the appellees beginning on or about July 1, 1950; (2) which continued to exist as such until Conrad's death on or about February 4, 1966; and (3) that Conrad was the manager of the partnership throughout its existence. The court rendered judgment on June 18, 1970, the pertinent elements thereof being:

1. That the partnership so found to exist, and called "G. C. Conrad Et Al." be

2. That appellee Kathryn Louise McCarthy be appointed as surviving partner to wind up the affairs of the partnership;

3. That certain real property known as the Lake Ranch in Collin County, Texas, and as 5530 Lobello Drive, in Dallas, Texas, be declared assets of "G. C. Conrad, Et Al," with title and possession awarded to and vested in said surviving partner as such; subject, however, to a homestead right, during her lifetime, to the use, benefit and enjoyment of one-half of the net proceeds of the sale of 5530 Lobello Drive, after payment of all expenses in connection therewith, in Mary Daniel Conrad, individually;

4. That the sum of $54,751.05 be debited to the capital account of Conrad on the partnership books, to reflect reversal of his "unauthorized drawings" found by the auditor and to reverse one-half of an unexplained credit of $5,000 which Conrad took for himself, as also stated in the auditor's report, so that after doing so Conrad's account would show a deficit of $40,298.12;

5. That Kathryn L. McCarthy, as such surviving partner, have and recover from appellant, individually and as executrix of Conrad's estate, $40,298.12 principal (representing the said deficit or overdraft) together with $41,076.27 as interest accrued to May 31, 1970 at 6 per cent per annum on the following unauthorized withdrawals by Conrad:

a. On $255.13 from Dec. 31, 1951

b. On $9,951.85 from Dec. 31, 1955

c. On $4,777.50 from Sept. 30, 1963

d. On $2,500 from Jan. 2, 1954

e. On $60,000 from Dec. 31, 1963

f. On $14,500 from Dec. 31, 1964,

together with interest on the total sum of $81,374.39 from May 31, 1970;

6. Fixing the court-appointed auditor's fee at $5,850 and taxing it and all other

7. That all portions of the cause of action relating to the winding up of the affairs of the dissolved partnership "and the determination of the amount of credits, if any, to be given to the capital account of Grover C. Conrad, deceased, for purchase moneys supplied by him in the purchase of Lake Ranch," be severed and docketed under a different number, "to remain under the continuing equitable jurisdiction of this Court until all affairs of the dissolved partnership are wound up and all properties distributed"; and

8. That appellant take nothing by her counterclaim.

[1] Appellant presents twenty-nine points of error on appeal. All of these except Nos. 14 and 29 are based upon assignments of error contained in appellant's amended motion for new trial. Appellees object to our consideration of these points because the so-called amended motion for new trial is in fact a second amended motion for new trial for which there is no authority in the rules. This contention is based upon the quite unusual circumstance that on June 26, 1970 two motions for new trial were filed, one by the appellant herself (a layman) entitled "Notice of Appeal for a New Trial," and the other in more traditional form signed by her then attorney of record. Appellees contend that since there is authority in the rules for only one motion for new trial and one amended motion for new trial, one of the motions filed June 26, 1970 must be considered as an amendment of the other, and that when the instrument entitled "Defendants' Amended Motion for New Trial" was filed on July 16, 1970 it in reality was a second amended motion for new trial and not entitled to be considered because of the prohibition in Section 2 of Rule 329b, Vernon's Texas Rules of Civil Procedure, against the filing of more than one amended motion for new trial.

We do not agree with appellees in this. Neither of the motions filed on June 26, 1970 purports to amend the other, and there is nothing in the record to indicate that either the appellant or her attorney knew that the other was filing a motion. Under these circumstances, we think the trial court correctly ruled that the two motions filed on June 26, 1970 should be considered as one motion and the amended motion filed on July 16, 1970 as the only amended motion for new trial. This is consistent with the spirit of liberal construction demanded by Rule 1, T.R.C.P.

Appellant presents her first four points of error on appeal together, and we shall so consider them. Under these points it is urged that the trial court erred (1) in failing to hold that the amounts charged by G. C. Conrad for his services to the enterprise known as "G. C. Conrad, Et Al" were reasonable, (2) in failing to hold that the making of a charge for such services is usual and customary in the oil industry, (3) in excluding the testimony of appellant's expert witnesses, Winn and Price, concerning the reasonable and customary charges for such services, and (4) in overruling appellant's motion for judgment notwithstanding the verdict because Conrad was entitled as a matter of law to compensation.

As noted above, the jury found that a partnership existed between Conrad and the appellees. There is no evidence that the parties to that arrangement ever agreed upon compensation for Conrad for his services in managing the jointly owned properties; in fact, the evidence is fairly certain that no such agreement was ever made. Appellees' mother, Edith Conrad, died January 14, 1949, intestate. Included in the community estate of Grover and Edith Conrad were half of the outstanding shares of common stock of Oil Well Drilling Company. On July 1, 1950 this stock was cancelled and the assets of the corporation represented by said stock, consisting of oil and gas leases, land, buildings and equipment, valued at $264,409.65, were distributed, 50 per cent to Conrad and 10 per

cent to each of the appellees. These assets were kept intact and managed by Conrad over a period of about fifteen years. Records were kept and income tax returns filed designating this enterprise as "G. C. Conrad Et Al."

[2] The general rule is that a partner is not entitled to compensation for services rendered to the partnership business unless there has been an agreement therefor. This is embodied in the Texas Uniform Partnership Act, Vernon's Ann.Civ.St., Art. 6132b, § 18(1) (f). See also 44 Tex. Jur.2d, Partnership, § 54, pp. 381–2.

The facts of this case do not provide a basis for a finding of an implied contract and thus bring it within the exception to that general rule announced in Hooker v. Williamson, 60 Tex. 524, 527 (1883); Montgomery v. Burch, 11 S.W.2d 545 (Tex.Civ.App., Amarillo 1928, writ dism'd); Lewis v. Hill, 409 S.W.2d 946 (Tex.Civ.App., Amarillo 1966, no writ); and 40 Am.Jur., Partnership, § 124, p. 216.

[3] It was clearly contemplated by all the partners, when they entered into the relation, that Conrad would act as manager and would be the only partner active in the conduct of the business, yet no agreement for his compensation was made or even suggested at that time. Such an agreement "may not be implied contrary to the intentions or understanding of the parties or against the express declaration of the person to be charged." Lewis v. Hill, 409 S.W.2d 946, 949 (Tex.Civ.App., Amarillo 1966, no writ).

[4] There was in evidence a brief exchange of correspondence between Conrad and the appellee Mrs. Judson, who lived in New York, beginning in December, 1961, and extending into 1963, from which it clearly appears that there was never an agreement as to his compensation, although in one letter she stated that she realized that he was entitled to "a fair fee" which she felt sure could be agreed upon if they ever reached the point where the accounts of all the owners were "evened up." The evidence does not show that Conrad ever actually withdrew from the partnership assets any money as salary, only that in 1963 he caused to be shown on the books of the partnership a credit to his account of $60,000 described as "Partners' salary—for services rendered the Partnership," and in 1964 a similar credit for salary in the sum of $14,500 with a notation on the books, "To record partner's salary for the year." These were mere bookkeeping entries rather than actual withdrawals, but without those credits his account would have been substantially overdrawn. Furthermore, there was little, if any, evidence of any particular work he did or services he rendered for "G. C. Conrad, Et Al" during the period he was in charge of the operation.

Under these circumstances, the appellees were entitled to rely on the general rule, above mentioned, which would deny their father any compensation. If appellant would seek to bring the case within the above mentioned exception, the burden was on her to introduce evidence and obtain jury findings of an implied contract, as well as the amount of such reasonable compensation. Conrad stood in a fiduciary relationship to his daughters; he occupied a position of great trust. The record indicates quite clearly that he withdrew sums largely in excess of his share of earnings and profits and caused these salary items to be credited to his account, without the semblance of any agreement on the part of appellees, or either of them, in order to convert the overdraft in his account to a credit balance.

[5, 6] Moreover, with respect to the fourth point of error, the defendants' motion for judgment, which both sides apparently treat as a motion for judgment notwithstanding the verdict, merely asks the

court to disregard the answers of the jury to the three special issues submitted and to make the necessary additional findings in order to enter judgment in appellant's favor. Rule 301, T.R.C.P., authorizes two separate motions, one for judgment *non obstante veredicto* and the other to disregard special issue jury findings. To be entitled to the first it must be shown that a directed verdict would have been proper; and to be entitled to the second it must appear that there was no evidence to support the findings. Our review of the entire record in this case reveals clearly to us that a directed verdict for appellant would not have been proper; and there was ample evidence to support the findings. For these reasons we approve the trial court's action in overruling the motion, if in fact it did. However, we find nothing in the transcript to indicate that this motion was ever presented to, or acted upon by, the trial court. Therefore, it was waived and nothing in this respect is presented to this court for review. Moss v. Katz, 69 Tex. 411, 6 S.W. 764 (1887); Marine Production Co. v. Richey, 89 S.W.2d 1078 (Tex.Civ.App., Texarkana 1935, writ dism'd).

Accordingly, appellant's first four points of error on appeal are overruled.

In her Points of Error Nos. 5, 6, 8, 9 and 10 appellant contends that there was no evidence, and insufficient evidence, of the existence of the partnership and, therefore, that the trial court erred in overruling her motion for judgment and her objections to the special issues submitted. We think there was an abundance of evidence to support all three of the jury findings. There was evidence that, shortly after appellees' mother died, Conrad proposed that he operate the business and handle the community assets because of his familiarity therewith and his opinion that his deceased wife would desire that he do so because in that way he and the daughters could all share the profits and the losses. The daughters agreed, and a set of books was opened in the name of "G. C. Conrad, Et Al." The enterprise was called, and apparently considered, a partnership by Conrad in his letters to Mrs. Judson and in her letters to him, as well as by the accountants employed to open its books in 1950 and the accountant appointed by the trial court to examine the books and state the accounts of the parties. The books so opened by the first accountants set up the capital accounts of the partners, showing Conrad as owner of 50 per cent, and each of the five appellees 10 per cent, of the capital assets as well as of the profits and losses. The operation was quite profitable for several years and the net profits were credited to the respective owners' capital accounts in the proportion stated. In subsequent years there were net losses and these were charged to the said capital accounts in the same proportion. United States income tax returns on Form 1065 were filed each year, and one in 1961 to the New Mexico Department of Revenue, all signed by Conrad under the penalties of perjury, and in each of them the taxpayer was designated as a partnership and he and his daughters as the partners. In a letter to an officer of the First National Bank Conrad spoke of appellees as the other partners in the partnership. Joe Melton, who was employed by Conrad to do the accounting work for "G. C. Conrad, Et Al," over a period of years, testified that Conrad always referred to the organization as a partnership. All of this evidence strongly indicated the existence of a partnership, and we find in the record no evidence to the contrary. Kitchens v. Kitchens, 372 S.W.2d 249, 253 (Tex.Civ.App., Waco 1963, writ dism'd); Nolen v. Rig-Time, Inc., 392 S.W.2d 754, 757 (Tex.Civ.App., Corpus Christi 1965, writ ref'd n. r. e.). A clearer case of partnership could hardly be demonstrated in the absence of a written partnership agreement.

Appellant's Points of Error Nos. 5, 6, 8, 9 and 10 are overruled.

[7] By her seventh point of error appellant complains of the definition of the

word "partnership" contained in the court's charge to the jury, as follows:

> "By the term 'partnership' as used in this charge, is meant a relationship between or among two or more persons where there is a common enterprise and a community of interest therein, the prosecution of the common enterprise for the joint benefit of the parties, and a right of each of the parties to participate to some extent in the profits as such and an obligation of each of the parties to bear some portion of the losses, if any, sustained by the business."

Appellant objected thereto because it did not tell the jury that a partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profits and bear the loss in certain proportions. The definition given by the court was correct. It embodied the elements of a partnership as set forth in Freeman v. Huttig Sash & Door Co., 105 Tex. 560, 153 S.W. 122, 125 (1913), and the form thereof was approved in Cavazos v. Cavazos, 339 S.W.2d 224, 226 (Tex.Civ.App., San Antonio 1960, writ ref'd n. r. e.) and Willis v. Harvey, 349 S.W.2d 323, 325–326 (Tex. Civ.App., Houston 1961, writ ref'd n. r. e.).

Moreover, the asserted error in the definition could not, in our opinion, be reasonably calculated to cause the rendition of an improper judgment and was therefore harmless. Rule 434, T.R.C.P. Accordingly, the seventh point of error is overruled.

By her eleventh and twelfth points of error appellant asserts that, because of appellees' knowledge that Conrad had charged $1,000 per month for his services during the first four months of the "G. C. Conrad, Et Al" operation, which began July 1, 1950, and knew prior to the partial distribution of "G. C. Conrad, Et Al" properties in September, 1963 that Conrad had charged that operation a salary of $60,000 for his services since 1950, their action was barred by laches and the two and four year statutes of limitation, which she pled.

These points are based upon two facts: the first being that the firm of accountants employed to set up the books of "G. C. Conrad, Et Al" prepared a report on that operation from its inception on July 1, 1950 through October 31, 1950, which showed a salary to Conrad of $1,000 per month for the four months covered by the report; the other being that on November 12, 1963, thirteen years later, Conrad wrote a letter to his daughters, to which he attached an unaudited balance sheet showing the partners' capital accounts as of September 30, 1963 and also showing the $60,000 salary credited to Conrad's account.

[8] We see no ground for reversal in either of these points of error. The $4,000 salary paid or credited to Conrad in 1950 is not complained of in appellees' petition and, so far as we can see from the record before us, no salary was paid or credited to him after October 31, 1950 until he arbitrarily had his account credited with the $60,000 in 1963, approximately thirteen years later. This suit was filed on December 23, 1965, more than two but less than four years after Conrad informed appellees of the $60,000 item. The delay of approximately 25 months in filing the suit cannot be said to have harmed or prejudiced Conrad in any way; therefore, the doctrine of laches is inoperative here. 35 Tex.Jur.2d, Laches and Stale Demands, § 10, p. 470.

[9] The applicable limitation statute is Art. 5527, § 3, V.A.C.S., which provides that an action by one partner against his co-partner for a settlement of partnership accounts shall be commenced and prosecuted within four years after accrual of the cause of action and not afterward. It has been held that the four-year statute applies to a suit between joint adventurers as well as between partners, and that the cause of action does not accrue and limitation begin to run until the termination of the relationship, whether a joint adventure

or a partnership, or at least until after a demand to pay over accrued profits has been made and refused. Cockburn v. Irvin, 88 S.W.2d 747 (Tex.Civ.App., Beaumont 1935, writ dism'd); Dyer v. Sterett, 248 S.W.2d 234, 240 (Tex.Civ.App., San Antonio 1952, no writ). The two-year statute (Art. 5526, V.A.C.S.) does not apply to dealings between partners. Heathington v. Heathington Lumber Co., 398 S.W.2d 822, 825 (Tex.Civ.App., Amarillo 1966, no writ), citing Morris v. Nunn, 79 Tex. 125, 15 S.W. 220 (1890).

[10] Moreover, appellant made no effort to obtain jury findings with respect to these affirmative defenses and, therefore, waived them. Rule 279, T.R.C.P.; Burba v. Lary, 296 S.W.2d 797 (Tex.Civ.App., Waco 1957, writ ref'd n. r. e.).

We overrule Points 11 and 12.

[11] In her Point of Error No. 13 appellant attacks the recovery of a money judgment by appellees because their claim was never filed against the estate of G. C. Conrad, as required by Sections 298 and 314, Texas Probate Code, V.A.T.S. As stated above, this suit was filed against Conrad in his lifetime. His death did not abate the suit. The proper procedure is set forth in Rule 152, T.R.C.P., permitting the legal representative of the deceased defendant to be substituted for him, as was done in this case, and providing that the suit shall proceed against such representative. The proper practice is then to certify the judgment to the probate court for payment in the course of the administration. Boone v. Roberts, 1 Tex. 147 (1846); Lauraine v. Ashe, 109 Tex. 69, 191 S.W. 563, 196 S.W. 501 (1917); Converse & Co. v. Sorley, 39 Tex. 515 (1873); Farmers' & Merchants' Nat. Bank v. Jones, 254 S.W. 251, 254 (Tex.Civ.App., Texarkana 1923, no writ). Point of Error No. 13 is overruled.

[12] By her Point of Error No. 14 appellant complains of the trial court's failure to file findings of fact and conclusions of law as requested by her. She says the judgment went far beyond the three jury findings, as illustrated by the court's finding that Conrad's drawings from the partnership were unauthorized; that appellees were under the burden to show they were unauthorized and did not request issues or obtain jury findings to that effect.

This argument is without merit. This was a jury case and there is no requirement or authority in the rules for findings of fact and conclusions of law in a jury case. Rule 296, T.R.C.P.; Ditto v. Ditto Investment Co., 158 Tex. 104, 309 S.W.2d 219, 220 (1958); T. A. Manning & Sons, Inc. v. Ken-Tex Oil Corp., 418 S.W.2d 324, 326 (Tex.Civ.App., Austin 1967, writ ref'd n. r. e.); Cox v. Rhodes, 233 S.W.2d 924, 926 (Tex.Civ.App., El Paso 1950, no writ).

[13] The written report of the auditor appointed by the court shows clearly and without question that Conrad's capital account on the partnership books was overdrawn when he attempted to bolster it by crediting it with the disputed salary items. The auditor's report was not excepted to before trial and was admitted in evidence without objection. There was no evidence to the contrary. Hence, there was nothing to submit to the jury in this respect. Rule 172, T.R.C.P.; Kempner v. Galveston County, 76 Tex. 450, 13 S.W. 460 (1890); Ware v. Harkins, 228 S.W.2d 537, 539 (Tex.Civ.App., Waco 1950, writ ref'd n. r. e.); Griffin v. Sevier, 234 S.W.2d 272 (Tex.Civ.App., Galveston 1950, no writ). Point of Error No. 14 is overruled.

[14] Under her Points of Error Nos. 15 and 16 appellant objects strenuously to the money judgment as rendered against her as an individual because there is no basis in the record for such personal liability. In reply, appellees make it clear they intended such personal liability only to the extent that she became the recipient of property belonging to Conrad's estate, and they attach to their brief a "Remittitur and

Release" as to all else. This restriction on appellees' right to recover is obviously correct and the judgment will be reformed accordingly.

We now reach the question, raised by appellant's Point of Error No. 24, of whether the Lake Ranch property was actually a partnership asset and whether it was proper for the court to decree title thereto in Mrs. Kathryn L. McCarthy as surviving partner. It appears without dispute from the record that between the years 1959 and 1962 the money expended on the ranch property was carried on the partnership books as an "account receivable" but that the land itself was carried as an asset on such books. It was shown as an asset in the United States income tax return filed by the partnership for the calendar year 1961. It appears from the auditor's report, and there is no evidence to the contrary, that the money expended by G. C. Conrad for the purchase and equipping of the ranch property came from partnership funds.

[15,16] In this connection it is important to note that the jury found that Conrad was the managing partner of the partnership. As such, he stood in a higher fiduciary relationship with the other partners than partners usually occupy. Smith v. Bolin, 153 Tex. 486, 271 S.W.2d 93, 97 (1954). The burden is upon the managing partner to dispel all doubts concerning his conduct toward the partnership or the other partners, and if he is unable to carry this burden all doubts will ordinarily be resolved against him. His duty is said to be analogous to that of a trustee. Cook v. Peacock, 154 S.W.2d 688, 690 (Tex.Civ. App., Eastland, 1941, writ ref'd w. o. m.). He owes the duty to keep an accurate account of his transactions with or for the partnership, and, if he fails to keep such account, all doubts respecting particular items will ordinarily be resolved against him on an accounting. Doubt as to the validity of credits which he claims must be resolved against him. Cook v. Peacock, supra; 44 Tex.Jur.2d, Partnership, § 53, p. 380; Newman v. Newman, 195 S.W.2d 393, 397 (Tex.Civ.App., San Antonio 1946, affirmed 145 Tex. 433, 198 S.W.2d 91). Partners occupy a fiduciary relationship with each other and the partnership, and this is true, whether the enterprise be considered a partnership or merely a joint adventure. Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786 (1938). All doubts, therefore, arising from the Lake Ranch transactions must be resolved against Conrad and his estate.

[17] Unless a contrary intention appears, property acquired with partnership funds is partnership property. Texas Uniform Partnership Act, Art. 6132b, § 8; Brinkley v. Harkins, 48 Tex. 225 (1877); Hengy v. Hengy, 151 S.W. 1127, 1131 (Tex.Civ.App., San Antonio 1912, no writ), wherein it is stated:

> "We are of the opinion that when a partner has purchased real estate with partnership assets, but in his own name, without the knowledge or consent of his copartner, and reports it to his copartner as firm property directly, or indirectly, by crediting the firm with rents and charging it with taxes and insurance, he cannot afterwards be heard to deny that the property purchased is in fact partnership property; nor would it be necessary that the property so purchased be used for partnership purposes."

[18] We think there is a presumption, under the above authorities, and particularly the Texas Uniform Partnership Act, that property purchased with partnership funds is intended to be partnership property; and if one would contend otherwise the burden would be on him or her to offer proof of a different intention and to obtain an affirmative jury finding thereon. No such finding was requested by appellant or made by the jury, and in this state of the record we think the trial court properly held the Lake Ranch to be a partnership asset. Hicks v. Hunter, 183 S.W. 792

(Tex.Civ.App., San Antonio 1916, writ ref'd). If the verdict did not find all of the facts necessary to form the basis of a judgment, since all of the questions submitted were answered the trial court is presumed to have found from the evidence the omitted facts necessary to support the judgment, there being evidence in the record to authorize the finding thus presumed. Southern Cotton-Oil Co. v. Wallace, 23 Tex.Civ.App. 12, 54 S.W. 638, 642-643 (Galveston 1899, no writ); Rotan Grocery Co. v. Noble, 36 Tex.Civ.App. 226, 81 S.W. 586, 589 (Dallas 1904, writ ref'd); McKnight v. Renfro, 371 S.W.2d 740, 746 (Tex.Civ.App., Dallas 1963, writ ref'd n. r. e.). We therefore overrule appellant's Point of Error No. 24.

[19] By her Points of Error Nos. 17 and 18 appellant says that the judgment is erroneous in that it awards appellees a "double recovery"—title to the Lake Ranch property, on the theory that it was purchased and equipped with partnership funds, and a money judgment for the deficit in Conrad's capital account, which was, in part at least, created when the amounts so expended for the property were charged or debited to that account.

The money judgment of $40,298.12 was arrived at in the following manner: it appears from page 8 of the auditor's report that, based on book values, G. C. Conrad's capital account as of December 31, 1965 showed a credit balance of $14,453.03; that upon reversing the unwarranted salary items totaling $74,500, half of that figure, or $37,250, was deducted from the said credit balance of $14,453.03, leaving a deficit or overdraft of $22,796.97; that additional items, not necessary to itemize here, totaling $15,001.05 should also have been charged against Conrad's account, increasing the deficit or overdraft to $37,798.02; and that the books showed an unidentified credit to Conrad's account on January 2, 1954 in the amount of $5,000. The trial court, in arriving at the amount of its judgment, added one-half of that unidentified credit, or $2,500, to the said figure of $37,798.02, producing a total deficit or overdraft of $40,298.02, and adjudged that the surviving partner should have judgment against Conrad's estate for $40,298.12 for the benefit of the partnership.

Appellant urges that this was erroneous, and in effect produced a double recovery, in that all of the above resulting figures included, or were in part based upon, a charge or debit to Conrad's capital account on December 31, 1962 in the sum of $48,264.73 as representing the value, according to the partnership books, of the Collin County farm lands known as the Lake Ranch. As we have hereinabove held, the ranch was a partnership asset. It was shown on the books as the "G. C. Conrad Lake Ranch Account," and the debit balance of this account during the years 1959, 1960, 1961 and 1962 was built up to $48,264.73. The ranch was carried as a partnership asset and shown as such in the United States income tax return filed by the partnership for the calendar year 1961. However, on December 31, 1962 this entire debit of $48,264.73 was charged to Conrad's personal account, and the partnership income tax return for the year 1962 did not show the ranch as a partnership asset. In other words, it is apparent from the record that Conrad decided unilaterally in 1962 that this was his personal investment rather than that of the partnership.

If we could be certain that all of the $48,264.73 charged to Conrad's account represented partnership funds expended in the purchase of the Lake Ranch, we would doubtless be justified in holding that it would be unjust for the partnership to be awarded title to a ranch which had been purchased wholly out of Conrad's own account or funds. In that situation there would appear to have been a "double recovery" as contended by appellant, and equity would require that the cost be distributed among the partners according to their pro rata shares in the ownership of the partnership assets.

But we have no such assurance. The auditor's report lists a great many items,

which are included in the said total of $48,264.73, but which are designated as "Cash Advances," "Advances" and "Loans." These are not insignificant items; they amount to a total of more than $20,000, but the report is silent as to the purpose or recipient of any of the said "advances" or loans, and as to what connection or relevance, if any, they might possibly have to the purchase of the ranch property. There are numerous other items in the account which we are unable to say from the evidence are connected with the acquisition of the Lake Ranch. We may not assume such connection or relevance, and are of the opinion that the trial court was warranted in rendering judgment that Mrs. McCarthy, as surviving partner recover, not for herself and her sisters personally, but on behalf of the partnership in which the Conrad estate owns a half interest, the full amount of the said deficit of $40,298.12. If, in the process of winding up the affairs of the firm, it develops, or can be shown, that any of Conrad's money went into the purchase of the ranch, equitable adjustment may be made in accordance with the express provisions of the judgment.

Therefore, we overrule appellant's Points of Error Nos. 17 and 18.

[20, 21] By her Point No. 19 appellant challenges the correctness of the judgment for $41,076.27 interest on alleged unauthorized withdrawals because there is no evidence that the withdrawals were unauthorized. We think this use of the word "unauthorized" may be somewhat misleading. Conrad was in complete charge of the operation and we see nothing in the record indicating that he was bound to apply for and obtain express authority or permission of his daughters every time he withdrew funds, or that the daughters should obtain authority from each other when they made withdrawals. All of the partners withdrew funds from time to time—often when the amounts withdrawn exceeded their shares of earnings and profits and consequently depleted their capital accounts to some extent, but nowhere in the record do we find any claim that any of them owed interest to the others on such withdrawals.

The phrase "unauthorized withdrawals," as used in the judgment and by appellant in her nineteenth point of error, in our opinion, was intended to refer to withdrawals by a partner which not only exceeded his or her share of profits and earnings but completely obliterated his or her capital account so that further withdrawals would necessarily lessen the value of the capital accounts of the other partners. The auditor's report shows that Conrad, and he alone, did that very thing, creating a deficit or overdraft in his account found by the auditor to be $40,298.12, which is the principal amount of the judgment. However, we think the trial court erred in also awarding the additional amount of $41,076.27 as interest.

The general rule is that, in a suit for partnership accounting, sums found to be due by one partner to another do not bear interest until after the partnership account has been settled and the balance owing ascertained. 44 Tex.Jur.2d, Partnership, § 261, p. 585; McKay v. Overton, 65 Tex. 82, 86 (1885); Jones v. Mitchell, 47 S.W.2d 371, 375 (Tex.Civ.App., Dallas 1932, writ ref'd); Lewis v. Hill, 429 S.W.2d 572, 575 (Tex.Civ.App., Tyler 1968, no writ); Hairston v. Richie, 338 S.W.2d 263, 268 (Tex.Civ.App., Fort Worth 1960, no writ). An exception to this general rule is announced in Corralitos Co. v. Mackay, 31 Tex.Civ.App. 316, 72 S.W. 624, 626 (San Antonio 1903, writ ref'd), that "where an accounting is delayed through misconduct or fraud, the partner guilty of such misconduct or fraud will be charged with interest for the time an accounting has been thereby delayed." We find nothing in this record to bring this case within that exception. In any event, it was improper to include in the recovery interest on the two salary credits aggregating $74,500. As stated above, these were mere bookkeeping entries and not "the use or forbearance or detention of money," within the statutory

definition of interest. Art. 5069-1.01, V. A.C.S.

Point of Error No. 19 is sustained.

By her Point No. 20 appellant says the trial court "erred in reversing the credits for the loss on the Peerless Gas deal," which was one of the items, among several, found in the auditor's report to be chargeable to Conrad's account.

[22] This constitutes an attack on a portion of the report of the auditor appointed by the court to state the accounts between the parties. As stated, this report was not excepted to before trial and was admitted in evidence without objection. Under these circumstances the report constitutes conclusive evidence as to such accounts, and the parties are not permitted to dissect the report and attack each segment separately. Griffin v. Sevier, 234 S.W.2d 272 (Tex.Civ.App., Galveston 1950, no writ); Cook v. Peacock, 154 S.W.2d 608 (Tex.Civ.App.; Eastland 1941, writ ref'd w. o. m.). If the rule were otherwise, the report of the auditor, who is an officer of the court, would be rendered null and void and his efforts futile. Rule 172, T.R.C.P.; Tracy v. Willacy County, 169 S.W.2d 217 (Tex.Civ.App., San Antonio 1943, no writ). The twentieth point of error is overruled.

[23] We also overrule Points 21 and 22, which complain of that part of the judgment awarding title and possession of the Conrad home at 5830 Lobello Drive to Mrs. McCarthy as surviving partner. Appellant concedes that the property is an asset of "G. C. Conrad, Et Al," but contends that her ouster from her homestead, which was based on the said auditor's report, violates her rights under Article 16, § 50, of the Texas Constitution, Vernon's Ann.St., which protects the homestead from forced sale for debts other than purchase money, taxes and improvements.

This constitutional provision is inapplicable here because the judgment does not order the homestead sold for debt. Section 52 of Article 16, however, does apply. As shown by the audit report, this property was acquired in 1951 with proceeds of the sale of the home of Conrad and his first wife, Edith Conrad, which home had also been an asset of "G. C. Conrad, Et Al." When Edith Conrad died intestate her children (the appellees) inherited her community one-half of the homestead but were not entitled to partition during Conrad's lifetime, as he had the right to use and occupy it as long as he lived. Article 16, § 52, Texas Constitution. But appellant, who was Conrad's second wife, did not have the same right of occupancy during her lifetime. All she is entitled to, upon sale of the home, is a life estate in the portion of the proceeds in which Conrad had a vested right, and this is exactly what the judgment awarded her. Clements v. Maury, 50 Tex.Civ.App. 158, 110 S.W. 185 (Austin 1908, writ ref'd); Marino v. Lombardo, 277 S.W.2d 749, 754 (Tex.Civ.App., Beaumont 1955, writ ref'd n. r. e.).

Her Point of Error No. 23 complains of that part of the judgment awarding title to the Lake Ranch property to Mrs. Kathryn L. McCarthy as surviving partner and in ordering appellant to convey the property to her, because there was no evidence as to how much of appellant's separate funds or community funds went into the Lake Ranch property. This point is overruled, because if any of appellant's separate funds or community funds went into this property, she failed to carry her burden of showing such fact and seeking and obtaining a jury finding thereon.

Under her Point of Error No. 25 appellant complains of the taxing of the auditor's fee of $5,850 against her, not on the ground that the amount is unreasonable, but on the ground that the appointment was unnecessary and the report useless. The facts revealed by the record do not support this contention and the point of error is overruled. This was one of the situations contemplated by Rule 172, T.R.C.P., and the trial court was clearly justified in

appointing an auditor, in allowing him a reasonable fee and taxing it, as part of the costs, against the losing party.

Appellant's Point of Error No. 26 complains of the severing of one part of the controversy from the other. This is based entirely upon appellant's contention that there was no partnership. Having upheld the jury's finding that there was a partnership, we overrule this point of error.

By her Point of Error No. 27 appellant complains of the trial court's refusal to allow her counterclaim for the value of personal services rendered by her deceased husband for the partnership. Since we have held that in the absence of an agreement therefor the partner has no right to demand or recover compensation, we overrule this point of error.

We have carefully considered all of the matters discussed by appellant under her Points of Error Nos. 28 and 29, and find them altogether unsupported by the record and therefore overrule the same.

The judgment of the trial court is reformed in the following respects:

(a) The award of accrued interest in the sum of $11,076.27 is eliminated therefrom.

(b) The money judgment of $40,208.12 is against Mary Daniel Conrad only in her capacity as executrix of the estate of Grover C. Conrad, deceased, and not against her individually.

(c) No execution shall issue on said money judgment, but it shall be taken into consideration in the winding up of the affairs of the partnership known as "G. C. Conrad, Et Al," and in the administration of the estate of Grover C. Conrad, deceased.

In all other respects the judgment is affirmed.

The costs of this appeal are taxed, half to appellant and half to appellees.

Reformed and affirmed.

APPENDIX "B"

No. 17588

MARY DANIEL CONRAD, EXECUTRIX

v.

RUBY WANDA JUDSON, ET AL

Friday, April 9, 1971

This day came on to be heard the motion of appellant for rehearing of this cause; and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

APPENDIX "C"

SUPREME COURT OF TEXAS

No. B-2729.

MARY DANIEL CONRAD, EXECUTRIX

v.

RUBY WANDA JUDSON, ET AL

From Dallas County, Fifth District.

July 21, 1971

Application of Mary Daniel Conrad, Executrix, for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District, as well as the application of Ruby Wanda Judson, et al, contingent upon the granting of the application on behalf of Mary Daniel Conrad, Executrix, having been duly considered by the Court, and the Court having determined that the application of Mary Daniel Conrad, Executrix, presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused, and that the contingent application of Ruby Wanda Judson, et al, accordingly be, and hereby is, dismissed.

It is further ordered that applicant, Mary Daniel Conrad, Executrix of the Estate of Grover C. Conrad, deceased, and her surety, United States Fire Insurance Company, and applicants, Ruby Wanda Judson, et al, each pay all costs incurred on their respective applications.

APPENDIX "D"

No. B-2729.

MARY DANIEL CONRAD, EXECUTRIX

v.

RUBY WANDA JUDSON, ET AL

From Dallas County, Fifth District.

November 10, 1971

Petitioner Mary Daniel Conrad's motion for rehearing of her application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "E"

No. B-2729.

MARY DANIEL CONRAD, EXECUTRIX

v.

RUBY WANDA JUDSON, ET AL

From Dallas County, Fifth District.

December 1, 1971

Petitioner's motion for leave to file second motion for rehearing, filed in the above numbered and entitled case on November 23, 1971, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "F"

Article V., Section 10, Constitution of the State of Texas.

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empaneled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum and with such exceptions as may be prescribed by the Legislature.

Texas Rules of Civil Procedure, Rule 277. Special Issues.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues; and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be

determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

Texas Rules of Civil Procedure, Rule 279. Submission of Issues.

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanation instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complainting of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues

necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.